Resolving Claims to United States Citizenship: Recent Updates and Adjudication Challenges

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Claims to U.S. Citizenship

The Honorable F. James Loprest, Jr.
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Recent Supreme Court Citizenship Decisions

Sessions v. Morales-Santana, 582 U.S. __, 137 S.Ct. 1678, 198 L.Ed. 420 (2017) (Ginsburg, J.): Gender line in INA § 1409(c) -- which creates exception for unwed USC mother (but not father) to the physical-presence requirement for transmission of citizenship to child born abroad -- violates Fifth Amendment equal protection.

Maslenjak v. United States, 582 U.S. __, 137 S. Ct. 1918, 198 L. Ed. 2d 460 (2017) (Kagan, J.): To denaturalize citizen, government must prove person obtained citizenship illegally, and if the underlying illegality is a false statement to government officials, government must prove false statement influenced the naturalization process.

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U.S. Citizenship is Jurisdictional

- Issue of US citizenship is an "essential jurisdictional fact" that must be decided first in Immigration proceedings
- Only "an alien" is subject to Removal proceedings or to Detention:
  - INA §§ 236 and 240(a)(1) of the Act
  - INA § 101(a)(3) (defining "alien" as "any person not a citizen or national" of the US)

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Jurisdictional Issues are Never Waived

Because jurisdictional issues are never waived, they may be raised at any point in the proceedings (even for the first time on appeal!)

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Four Methods of Obtaining US Citizenship

1) Birth in the United States or outlying possessions (the law of *jus soli*)
2) Naturalization (Constitution)
3) Birth Abroad – Citizenship acquired at time of birth by operation of law
4) Birth Abroad – Citizenship acquired at a later date by operation of law

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Birth in U.S. or Possessions

The most commonly litigated issues
arising in Immigration Courts relate to:

- Reliability and probative value of
  evidence submitted to establish date
  and place of birth

- Proof of identity: Is the respondent
  really the person named in evidence?

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Naturalization

Immigration Courts do not have jurisdiction
over naturalization petitions, but some
issues may arise:

- Respondent may claim he was naturalized;
  evidence must show process was completed,
  *including oath of citizenship. See Escaler v.
  USCIS,* 582 F.3d 288 (2d Cir. 2009).

- Validity or timing of a parent's naturalization
  may be relevant to derivative citizenship claim.

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Acquired US Citizenship – Birth Abroad

There are two methods by which a person born abroad may acquire US citizenship by operation of law – so-called "derivative" citizenship or naturalization because alien <u>derives</u> citizenship from parent or parents:

1) *Citizenship acquired <u>at</u> birth*
2) *Citizenship acquired <u>after</u> birth*

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Birth Abroad - Presumption

- **Presumption of Alienage** - A person born abroad, or outside of the United States, is *presumed* to be an alien. *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969).

- The presumption applies to all claims of *acquired/derivative citizenship* regardless of which statutory scheme applies (but does not apply if the alien denies birth abroad).

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Both Parents Citizens?

- Person born abroad automatically becomes national and citizen if:
- (a) both parents are United States citizens; and
- (b) at least one parent has had a U.S. residence prior to the person's birth.
- *See* 8 U.S.C. § 1401(c).
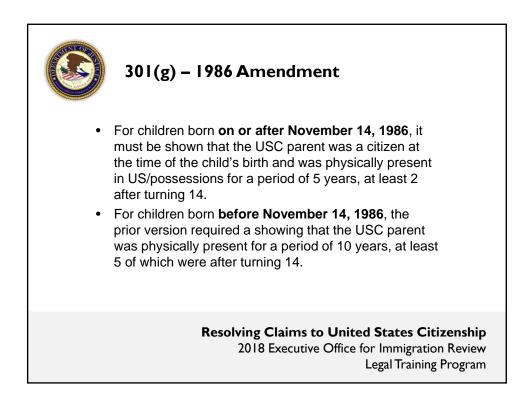
One Parent a Citizen?

- If one parent is not a United States citizen, however, a person who is born abroad may still acquire U.S. citizenship if the other parent is a United States citizen who has been physically present within the United States for a sufficient length of time prior to the birth.
- *See* 8 U.S.C. § 1401(g).

Burden of Proof

- If there is a presumption of alienage, the person alleged to be an alien bears the burden of establishing his/her claim to United States citizenship by a *preponderance of credible evidence* ("more likely than not"), but the DHS maintains the overall burden of proof
  - *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008)
  - *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969)

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Action Taken if Meets Burden of Proof

- **Removal Proceedings** – Terminate proceedings
  - If the person charged in Removal proceedings meets his/her burden of showing that he/she is not an "alien" who is subject to removal, the proceedings will be terminated
- **Bond Proceedings** – order released, because there is no authority to detain USCs
- **Claimed Status Review** – vacate I.O.'s removal order and admit to US as a citizen

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Termination v. Finding the person is a USC

- Finding that termination is appropriate because someone has met the burden of proof regarding citizenship does NOT amount to declaring that someone is in fact a citizen.
    - Only USCIS has the authority to adjudicate naturalization/citizenship applications.
    - U.S. District Courts may issue a "Declaratory Judgment" that someone has established he/she is a USC
- IJs generally just find that there is enough evidence (the preponderance of evidence) that the person is a USC such that he/she is not an "alien" subject to removal proceedings

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Citizenship Acquired <u>at</u> Birth Abroad

Section 301(g) of the INA sets forth the general criteria for acquisition of US citizenship at the time of birth for persons born abroad to one USC parent and one non-USC parent

- *It is very important to check the birth date of the person claiming citizenship at birth:*
    - *It must be shown that the USC parent was a USC on the date of the child's birth*
    - *That date will determine which version of the statute applies*

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301(g) – 1986 Amendment

- For children born **on or after November 14, 1986**, it must be shown that the USC parent was a citizen at the time of the child's birth and was physically present in US/possessions for a period of 5 years, at least 2 after turning 14.
- For children born **before November 14, 1986**, the prior version required a showing that the USC parent was physically present for a period of 10 years, at least 5 of which were after turning 14.

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Section 309 – Unwed Parents

The recent Supreme Court decision found that the exception for unwed mothers in 309(c), which reduced the time of physical presence required, violated equal protection.

- Now, if the parents were unwed, whether the USC parent was the father or the mother, the child must establish (depending on the birth date) the 5-year or 10-year period of physical presence

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Citizenship Acquired <u>After</u> Birth Abroad

INA § 320 (amended by the Child Citizenship Act of 2000 – "CCA") governs most of these claims:

- The person's birth date is crucial to determining if current INA § 320 applies
- It applies to persons who were <u>under 18 years old</u> on the effective date of the CCA (Feb. 27, 2001)
- i.e. applies to any person **born after February 27, 1983**

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Section 320 Requirements

A child born outside of the United States may acquire US citizenship by virtue of the relationship with his or her parent or parents by showing:

(1) at least one parent is a citizen (by birth or Natz);

(2) he or she is under the age of 18;

(3) he or she is a lawful permanent resident; **and**

(4) he or she is residing in the United States in the legal and physical custody of the citizen parent

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Regulations Applicable to § 320 claims

- Definitions - **§ 320.1**
  - Defines "legal custody," including **presumptions**
- Criteria - **§ 320.2**
- Procedure for applying for Certificate of Citizenship (Form N-600) - **§ 320.3**
  - Only USCIS adjudicates these applications
  - IJ's may not review USCIS decision
  - However, even if USCIS denied, an IJ may find the respondent has presented sufficient evidence in the removal proceedings to show by a preponderance of credible evidence that he/she is a citizen

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Former § 321 – born on/before 2/27/1983

- Former section 321(a) governs for cases where a parent or parents naturalized if the person was 18 or over on the effective date of the CCA, February 27, 2001
- i.e. this section applies to persons born **on or before February 27, 1983**
  - *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001)
  - *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009)

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Adopted Persons born on/before 2/27/1983

Former § 322 applies to <u>adopted</u> persons who were born on or before February 27, 1983

- Citizenship was <u>not</u> automatically acquired under this section
- If the parent did not apply for a certificate of citizenship before the child turned 18, the child could not become a USC

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Former § 321(a) Requirements

Like current section 320, former 321(a) requires the person to have **LPR status** and **be under 18**. But it also requires:

(1) the naturalization of <u>both</u> parents;

(2) the naturalization of the surviving parent if one of the parents is deceased;

(3) if parents were married, the naturalization of the parent having <u>legal custody</u> of the child when there has been a <u>legal separation or divorce</u> of the parents; **or**

(4) if the child was born out-of-wedlock, the naturalization of the mother, if the paternity of the child has <u>not</u> been established by <u>legitimation</u>.

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Former § 321(a) – Legitimation/Custody

There are many issues that arise in these 321(a) cases relating to divorce/separation, legal custody, and legitimation

• Check Circuit caselaw and Board decisions
• E.g. <u>Matter of Cross</u>, 26 I&N Dec. 485 (BIA 2015)

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"Child" Defined

Section 101(c)(1) of the Act provides the definition of "child" to be used in Title III of the INA

• Compare to the section 101(b)(1) definition applicable to visa petitions
• Does not include step-child - *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009)
• Does not included adopted child, BUT section 320 incorporates the definition of adopted child that is included in 101(b)(1)(E) of the Act

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Common Scenario

- Person was born abroad
- He/she came to U.S. as an LPR when he/she was a child
- One or both parents naturalized <u>prior to</u> the person's 18th birthday
- If only one parent naturalized prior to the person's 18th birthday, questions may arise regarding which parent had custody (but there are some presumptions under 320)
  - 321(a) cases might need to address additional questions re: whether the parents married; if so, whether there was separation/divorce/custody order; if not, whether the child was legitimated, etc.

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U.S. Citizenship is Jurisdictional!!!

Thank you.

FJL & EMM